

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN THE
GILA RIVER SYSTEM AND SOURCE

DATE: July 19, 2006

CIVIL NO. W1-11-1174
(Consolidated)

ORDER

CONTESTED CASE NAME: *In re PWR 107 Claims.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master stays the determination of sixteen claimed federal reserved water rights and sets a schedule for a partial decree for fourteen federal reserved water rights and the withdrawal of ten claims.

NUMBER OF PAGES: 7.

DATE OF FILING: July 19, 2006.

Initially, this contested case involved thirty-nine springs and one dam. The United States has advised that it will withdraw ten statements of claimant, leaving thirty water right claims to be resolved. The United States and the objectors have resolved by agreement all objections to fourteen claims. The United States has resolved by agreement all the objections to the remaining sixteen claims except the objections of the San Carlos Apache Tribe (“Apache Tribe” or “Tribe”).¹

The United States argues that the reporting of its claims in the Final San Pedro River Watershed Hydrographic Survey Report (1991) (“HSR”) “establishes the prima

¹ Joint Status Report (Aug. 1, 2005).

facie evidence of the water rights” it claims as federal reserved water rights under Public Water Reserve No. 107 (“PWR 107”).² The HSR “establishes the United States as the rightful claimant and owner of the water rights.”³

The United States submits that “[t]ypically, ‘prima facie evidence’ is defined as:”

Such evidence as, in the judgment of the law, is sufficient to establish a given fact ... and which if not rebutted or contradicted, will remain sufficient. [Such evidence], if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence.” Black’s Law Dictionary 1190 (6th ed. 1990) [*see* 8th ed. 2004 at 598].⁴

The United States concedes “that the HSR establishes a rebuttable presumption,” but argues that the Apache Tribe has not presented evidence refuting the “United States’ ownership and entitlement to these water rights.”⁵

A.R.S. § 45-256(B) provides that, “Each claimant who has filed timely written objections that comply with this subsection shall have a fair and reasonable opportunity to present evidence in support of or in opposition to those recommendations of the director.” The Apache Tribe objected to the sixteen claims of the United States and raised the boundary issue in some of its objections. The Tribe has the right to present evidence in support of its objections including evidence that the sixteen springs are located inside the boundaries of the San Carlos Indian Reservation (“Reservation”) and not on public lands managed by the Bureau of Land Management (“BLM”).

It must be noted that the cited language of A.R.S. § 45-256(B) as well as the provisions allowing the Arizona Department of Water Resources (“ADWR”) to make recommendations about water right attributes were added in 1995, four years after the Final San Pedro River Watershed HSR was published. Because this case moved into settlement mode fairly quickly and due to funding limitations, ADWR has neither updated the watershed file reports of the forty claims nor made recommendations, pursuant to A.R.S. § 45-256(B), about the attributes of these water rights. Neither the

² U.S. Memo. Regarding Claims Affected by Boundary Issues 4 (Feb. 16, 2006) (“Memo.”) President Calvin Coolidge’s PWR 107 order states: “[E]very smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole, located on unsurveyed public land, be and the same is hereby, withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the Act of December 29, 1916. 43 C.F.R. 292.1 (1938).” The Act of December 29, 1916, is the Stock Raising Homestead Act, 43 U.S.C. 291 et seq. Section 10 of the Act authorized the President to reserve lands “containing water holes or other bodies of water needed or used by the public for watering purposes.” Ch. 9, 39 Stat. 865, 43 U.S.C. 300 (repealed 1976).

³ *Id.*

⁴ *Virginia v. Black*, 538 U.S. 343, 369 (2003).

⁵ U.S. Reply 3 (June 30, 2006).

United States nor the Tribe has argued that the 1995 legislative amendments do not apply in this case; in fact, both have used them in their arguments.

The Arizona Supreme Court reviewed the constitutionality of A.R.S. § 45-256(B) and held that:

Under § 45-256(B), claimants are permitted to file timely, specific written objections to DWR's recommendations and have a fair and reasonable opportunity to present evidence supporting or opposing the recommendations.

... If the claim or use described in the report is 500 acre-feet or less, the information describing that water right claim shall be summarily admitted into evidence, and *in the absence of conflicting evidence*, the report's proposed attributes are to be deemed correct and incorporated into the decree. If conflicting evidence is presented, however, DWR's proposed attributes are given the weight deemed appropriate by the master and the court.⁶ (Emphasis added.)

In short, if no objection is filed to ADWR's recommendation in an HSR about a water right's attributes, the recommendation could be prima facie evidence of the correctness of the attributes. However, if a proper objection is filed, the objector has a fair and reasonable opportunity to present evidence to rebut or contradict the recommendation.

The Tribe has the opportunity to present evidence to rebut the HSR's demarcation of the Reservation's boundary near the sixteen springs. Until that evidence is heard, the United States cannot benefit from a prima facie evidentiary presumption.

The Tribe argues that (1) the correct boundary of the San Carlos Indian Reservation is the boundary established by the Executive Order of December 14, 1872 - "a line 15 miles south of and parallel to the Gila River" and (2) the land surveys the United States relies on "do not accurately reflect the southern boundary of the Reservation as a line '15 miles south of and parallel to the Gila River,' based upon the Executive Order of December 14, 1872, and subsequent confirming Acts of Congress."⁷

Between 1871 and 1990 fourteen federal actions occurred that affected the southwestern portion of the Reservation, and between 1883 and 1989 eight land surveys of the southwest boundary of the Reservation were completed and approved.⁸ An evidentiary hearing could be held to determine the historical record and the accuracy of the surveys. The outcome, however, would be a determination of the Reservation's boundary relative to the sixteen springs, and both parties agree that this Court "lacks

⁶ *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 214, 972 P.2d 179, 198 (1999).

⁷ Apache Tribe Corrected Response 14 (June 7, 2006).

⁸ ADWR's Report Concerning the Boundary of the San Carlos Indian Reservation Relative to PWR 107 Springs, Tables 2 and 3 (May 16, 2005). The BLM completed the last five surveys.

jurisdiction to adjudicate the underlying issue of the Reservation boundary.”⁹ As the Tribe says, “there would be no point in setting an evidentiary hearing... [to] determine which springs are either inside or outside of the Reservation.”¹⁰

Figure 3 of ADWR’s May 16, 2005, report depicts five alternate boundaries, four of which show some of the springs being inside the Reservation. One alternate boundary is based on the Executive Order of December 14, 1872, for which the information was provided in a report prepared by a historian in 1989 at the request of the Department.¹¹ This report was presumably available to ADWR when it was preparing the 1991 HSR, leaving albeit a speculative impression, that the boundary issue was known when the HSR was prepared, but if raised by objection, the issue would be left for the litigation phase (where we find ourselves now). The 1989 report is not mentioned in the HSR.

The Tribe has asked that the adjudication of the sixteen springs, whose locations relative to the Reservation’s boundary is a disputed issue, be stayed. It cites to the 1963 and 1983 opinions of the United States Supreme Court in *Arizona v. California*.¹²

In the 1963 case, the Court’s appointed Special Master determined the boundaries of two Indian reservations whose water rights were being quantified. The Master had jurisdiction to determine reservations’ boundaries and did so. The Court held that:

“We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here.”¹³

Twenty years later, the Court found that “[t]he disputes about the boundaries of the Colorado River and the Fort Mojave Reservations are still with us,”¹⁴ and held that:

It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes.¹⁵

The Supreme Court clearly stated a preference that a dispute concerning the boundary of an Indian reservation, arising in a water rights case, be “settled in other

⁹ U.S. Memo. 6.

¹⁰ Apache Tribe Corrected Response 10.

¹¹ ADWR’s Report 3-4.

¹² *Arizona v. California*, 373 U.S. 546 (1963); *Arizona v. California*, 460 U.S. 605 (1983).

¹³ 373 U.S. at 601.

¹⁴ 460 U.S. at 630. By then disputes about the boundaries of three other reservations had emerged.

¹⁵ 460 U.S. at 638.

forums.” Those words can be construed to mean a resolution by diplomacy¹⁶ or by litigation in federal district court.

Based upon this Court’s agreed lack of jurisdiction to determine the boundary of an Indian reservation and the holdings of the U.S. Supreme Court in the *Arizona v. California* litigation, the Special Master will recommend that the adjudication of the sixteen springs as potential PWR 107 water rights be stayed until such time as the southwest boundary of the San Carlos Indian Reservation has been established or is no longer in dispute between the United States and the Tribe. The remaining claims will be addressed according to the following schedule.

The United States and the Tribe will be given thirty days after service of this order to execute stipulated proposed abstracts of water rights for the other fourteen springs. The United States has previously stated that it has executed a stipulation and proposed abstracts with all the other objectors.

Within twenty days thereafter, the United States shall submit to ADWR the complete proposed stipulation and abstracts of water rights for the fourteen springs. ADWR will have sixty days to review the stipulation and abstracts in accordance with the following directives previously given and file its recommendations:

1. Because ADWR can review its water right records and other information, including that provided by the parties, related to these claims, the Special Master plans to direct ADWR to advise the Special Master of its recommendations regarding any settlement agreement. A comprehensive technical report is not contemplated but rather a review and recommendations regarding a settlement agreement.¹⁷
2. ADWR’s review shall be limited to the accuracy and completeness of the factual information contained in the stipulated abstracts of water rights. During the course of ADWR’s review, if it would facilitate and expedite, but not delay, the process, ADWR, the United States, and the objecting parties may discuss and make factual corrections.¹⁸

The parties in this case will have forty-five days after service of the report to file objections or comments to ADWR’s report. Within sixty days thereafter, the Special Master will rule on objections or comments and file a report and proposed partial decree.

Claimants will have sixty days to file objections to the Special Master’s report. They will have sixty, and not 180, days because the report will not cover “an entire...federal reservation.” A.R.S. §45-257 (A)(2) states in pertinent part:

¹⁶ The Tribe’s counsel has stated that discussions to resolve the boundary issues are taking place at high Executive levels. Concerning litigation, see *United States v. Mottaz*, 476 U.S. 834 (1986).

¹⁷ Special Master’s Order 2 (May 24, 2004).

¹⁸ Special Master’s Order 3 and 2 (Sept. 30, 2004).

Each claimant may file written objections with the court to any rule 53(g) report within the later of sixty days after the report is filed with the court or within sixty days after the effective date of this amendment to this section. If the report covers an entire subwatershed or federal reservation, each claimant may file with the court written objections to the report within one hundred eighty days of the date on which the report was filed with the court.

The fourteen springs are a portion of the federal reserved water rights that may be adjudicated to the BLM's Gila District. The Special Master's report and proposed partial decree for the fourteen springs will not cover all the water rights of an entire federal reservation or subwatershed.

IT IS ORDERED:

1. The adjudication of the following sixteen springs shall be stayed until such time as the southwest boundary of the San Carlos Indian Reservation has been established or is no longer in dispute between the United States and the Tribe:

<u>ADWR No.</u>	<u>Spring Name</u>	<u>Statement of Claimant</u>
5	Juniper	39-11211
7	Claridge	39-11203
8	Cottonwood	39-11204
9	Upper Boulder	39-11202
10	Goat	39-11209
12	No. 2	39-11201
15	Warm	39-11445
21	Horse	39-11210
22	Juniper	39-11183
23	Deer Creek No. 2	39-11205
24	Deer Creek No. 1	39-11207
25	Bull Mulhy	39-11187
26	Chest	39-14446
27	Indian Draw	39-11206
28	Oak	39-11181
29	John	39-11182

2. On or before **August 23, 2006**, the United States and the Tribe shall execute the stipulated abstracts of water rights for the following fourteen springs:

<u>ADWR No.</u>	<u>Spring Name</u>	<u>Statement of Claimant</u>
1	Cooper Creek Dam	39-11219
2	Bootlegger	39-11222
3	Lime Peak	39-14500
4	McEwen	39-14419
6	Brandenburg	39-11180
11	Purgatory	39-14444
13	Wood Trough	39-11438

14	Goat	39-14492
16	Swamp	39-14442
17	Lost Trail	39-14441
18	Tar Wash	39-14439
19	Bisbee No. 1	39-11228
20	Ursula Captain	39-14440
30	Miller	39-11160

3. On or before **September 12, 2006**, the United States shall submit to ADWR the complete proposed stipulation and abstracts of water rights.

4. On or before **November 13, 2006**, ADWR shall review the proposed stipulation and abstracts in accordance with the directives stated above and file its recommendations.

5. On or before **January 2, 2007**, any party in this case may file objections or comments to ADWR's recommendations.

6. On or before **March 5, 2007**, the Special Master will rule on objections or comments and file a report and proposed partial decree with the Court.

7. Claimants shall have sixty days to file objections to the Special Master's report and proposed partial decree.

DATED: July 19, 2006.

/s/ George A. Schade, Jr.
 GEORGE A. SCHADE, JR.
Special Master

On July 19, 2006, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court-approved mailing list for Contested Case No. W1-11-1174 dated July 7, 2006.

/s/ KDolge
 Kathy Dolge